Notwithstanding the general rule, as stated in the beginning, is based upon the idea that the relation of master and servant does not exist.

The writer has not found any case directly deciding the point, but in Bibb's case we find this significant language: "It can but be obvious to every impartial mind that when any person . . . . has, in the exercise of due care and caution, selected a competent and skillful contractor, &c."

Whilst this is an *obiter*, yet the fact was noticed, and seems to have been in the mind of the court, that there was "no lack of such care and caution."

But if the owner, under the general rule, is exempt from liability for the negligence of this contractor, and none of the other six circumstances above mentioned exist, upon what principle of responsibility or existing relationship can an injured party complain that the owner was not prudent in his selection of an independent responsible will to accomplish a given work? Is it not presumed that the owner would engage and had engaged a reasonably careful and competent contractor in the outset?

GEO. E. CASSEL.

East Radford, Va., Jan. 27, 1897.

TESTIMONY OF A DECEASED WITNESS IN CRIMINAL CASES.

There is no question as to the rule that in a civil action testimony is admissible to show what a witness, since deceased, stated on a previous trial between the same parties and on the same issue.

It was formerly held, and is, perhaps, still the rule in England, based upon a *dictum* of Lord Kenyon, that the whole of the deceased witness' testimony must be given in his precise words; but now in the United States the almost universal rule is that it is sufficient to give the substance of what the witness stated. *Caton v. Lenox*, 5 Rand. 36.

It was also formerly held that such testimony was only admissible in case of the death of the witness; but now the rule is not so strict, and such evidence is usually admitted where the witness is beyond the jurisdiction of the court, has become insane, cannot be found, or has been removed by the procurement of the other party, though there is great conflict on this point.

The rule admitting such testimony is based on the fact that the statements of the witness on the former trial were made under oath in the presence of the party, and he had an opportunity to cross-examine.

The subsequent cause must be between the same parties, or their privies or representatives, and on the same issue.

In Virginia, this rule, while applied to civil cases, has always been held to have no application to criminal cases.

The last case on the subject is *Brogy's Case*, 10 Gratt. 722 (732). This case rests entirely on *Finn's Case*, 5 Rand. 701, on this point, and cites no other authority. It was decided in 1853.

In *Finn's Case*, 5 Rand. 701, on page 708, the opinion reads: "In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him. . . . But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. Peake, 60, quoting *Fenwick's Case*, 4 St. Trials." This case was decided in 1827.

Norris' Peake (p. 90) says: "Even the evidence which a witness gave on a fo mer trial between the same parties has after his death been read in a civil action, the foundation being laid for it by the production of the postea. But this is not allowed in a criminal prosecution. And in other cases the witness who is to prove what is sworn should give the precise words, and not what he supposes to be the effect of the evidence."

The only authority which Peake cites in this regard is *Fenwick's Case*, 4 St. Trials, 265 (5 Hargrave's St. Trials, 39).

On this point we refer to the excellent notes of Cowen & Hill to Phillips' Evidence. In Book 3, p. 323 (Note 205) the author says: "In the second case (*i. e.*, *Finn's Case*) Peake's Ev. 60 is cited, who refers to *Fenwick's Case*. . . . It is true that Peake relies on that case as proving that such evidence is inadmissible in a criminal proceeding; but he is followed by *no other writer;* and the case itself carries the rule even farther against a criminal than was ever done against a party in a civil cause."

Fenwick's Case does not seem to apply to this question at all. It was a bill of attainder brought against Sir John Fenwick for high treason, in that he was conspiring against William to restore James. There were two witnesses, Porter and Goodman, on whose testimony

an indictment had been found against him, and who had made their statements before a magistrate, under oath, as to the conspiracy.

One of the witnesses, Goodman, was removed from England through the efforts of Lady Fenwick, who it seemed acted at the instance of her husband.

The law required the testimony of two witnesses to convict of treason, and therefore, as one of the witnesses had been removed, Fenwick could not be convicted by trial at law. To overcome this obstacle he was brought before Parliament on a bill of attainder, for the reason that Parliament was not bound by any statute nor by any rules of evidence.

On that trial before Parliament the King's Counsel offered to prove the statements of the absent witness, Goodman, given before the magistrate, when Fenwick was not present and had no opportunity to cross-examine, and also the testimony of Goodman given on the trial of Cook, a fellow-conspirator with Fenwick, which evidence equally inculpated Fenwick.

It was agreed on all sides that such evidence was not admissible in a law court, but they considered that Parliament was not bound down to forms of law, and the testimony was heard.

It will be easily seen that this case is not in point: 1st. Because tried before Parliament, which did not recognize any rules of evidence as administered in the law courts as binding upon it, and it was for the very purpose of evading these rules that the case was brought before Parliament. 2d. The witness, Goodman, was removed at the instance and by the procurement of Fenwick. 3d. Goodman was merely out of the jurisdiction of the court, and not a deceased witness. 4th. The statements of Goodman before the magistrate were not made in the presence of Fenwick, and he therefore had no opportunity to cross-examine, so that the prisoner was not confronted by his accuser as required by Magna Charta. 5th. The testimony of Goodman given on the trial of Cook, while it may have equally inculpated Fenwick, was not given on a trial between the same parties, so that one of the essential requisites for the admission of the evidence was lacking.

So we find that *Fenwick's Case* offers no precedent for the proposition, where a witness is examined in a criminal trial, and the accused is present, and has opportunity to cross-examine and contradict, that if the witness dies, his testimony cannot be proved in a subsequent trial between the same parties, on the same issue.

Judge Brockenbrough says, in his opinion in *Finn's Case*, that they

cannot find that such evidence had ever been received in a criminal case. In *Rex v. Jolliffe*, 4 Term Rep. 285, decided in 1791, the rule is thus stated by Lord Kenyon: "It has been said that in no case whatever can the proceedings in one cause be made use of in another; but the contrary is in every day's practice. In the Court of Chancery depositions taken in one case are frequently read in another, saving all just exceptions, as that they are not between other parties, &c. So, in courts of law, the evidence which a witness gave on a former trial may be used in a subsequent one, if he die in the interim; as I remember was agreed on all hands in a trial at bar in the instance of Lord Palmerston; but, as the person who wished to give Lord Palmerston's evidence could not undertake to give his words, but merely to swear to the effect of them, he was rejected." This was a criminal case and was decided long prior to *Finn's Case*. See, also, the *Information against Buckworth*, T. Raym. 170.

In *Commonwealth v. Richards* (Mass.), 29 Am. Dec. 608, the rule is very clearly and forcibly stated that when on a former trial the accused is faced by the witness and has an opportunity to cross-examine, evidence of what the deceased witness swore to, is admissible on a subsequent trial of the same party on the same charge, and that this is no violation of the constitutional provision that the accused must be confronted with the witnesses against him. But the case also holds that the whole testimony of the deceased witness must be given in his own words, and not merely the substance of what he swore to. Citing the Case of *Buckworth*, T. Raym. 170.

An examination of the American authorities shows that they are overwhelmingly in favor of the admissibility of such evidence in criminal cases. See the American notes to Roscoe's Criminal Evidence (new edition), p. 104, where the authorities are collected, and it would seem that Virginia is the only exception to the rule; Wharton's Law of Evidence, sec. 177, *et seq.*, and notes, where it is stated that the rule is the same in criminal cases; see, especially, Wharton's American Criminal Law, sec. 667, and note, where *Fenwick's Case* is commented on and distinguished, and where it is stated that the *substance* of the deceased witness' testimony is sufficient; Greenleaf on Evidence, sec. 163, *et seq.*; Chamberlayne's Best on Evidence, p. 448; and May's edition of Stephen's Digest of the Law of Evidence, pp. 89–90. But see case of *U. S. v. Angell*, 11 Fed. Rep. 34, where a distinction is made between a deceased witness and an absent witness.

In both *Brogy's Case* and *Finn's Case* the witnesses were not dead,

but had removed beyond the jurisdiction of the court; and while in *Finn's Case* the court held that the rule excluding the evidence applied as well to a deceased witness as to an absent witness, yet this question was not necessary to the decision of the case, and the opinion of the court as to that point was *obiter dictum*.

In *Crite's Case*, reported in 5 Va. Law Journal, p. 568 (but which for some reason was not published in the official reports), the Virginia court held, citing *Brogy's Case* and *Finn's Case*, that evidence of a witness, since removed beyond the jurisdiction of the court, taken before a coroner, could not be read on the trial of the accused (but puts a *quære* as to a dead witness). The court lays stress on the fact that the evidence was taken before a coroner, where perhaps a full and accurate disclosure of the facts known to the witness would not be given as would be done if taken on a trial in the presence of the accused and subject to cross-examination by counsel; and states that the objection to such evidence in a case like this is much greater than if it had been taken at a former trial, and in the presence of the accused and his counsel.

The same rule as to testimony given before a coroner is followed in *Whitehurst's Case*, 79 Va. 556, which cites *Crite's Case*. It will be seen, however, that in both *Crite's Case* and *Whitehurst's Case* the testimony was not given in a former trial, but before a coroner, and that the witnesses were not dead but merely beyond the jurisdiction of the court. See 9 Va. Law Journal, p. 700; also, 10 Id. 255.

In the case of an absent witness, in some States the difficulty might perhaps be overcome by taking his deposition; but it would seem that in the case of a dead witness, the necessity of the case is sufficient justification for a departure from the strict rules of evidence, as is done in the case of dying declarations, for the reason that otherwise most vital testimony might be lost.

The authorities are almost unanimous in favor of the admission of such evidence, and it does not seem that there is any sufficient reason to justify its exclusion. It is clearly admissible in civil cases, and there is no difference between the general rules of evidence in civil and criminal cases.

It cannot be objected that the accused is not confronted with the witness against him, for he hears the testimony in both trials and has opportunity to cross-examine and deny in both. Moreover in cases of homicide the dying declarations of the deceased in regard to

the circumstances of the killing are received against the accused, though he has had no opportunity to cross-examine.

The rule excluding this evidence throws an unreasonable safeguard around the criminal, and an unnecessary burden on the Commonwealth, for the reason that the burden of proof is on the Commonwealth and the absence of testimony will bear more heavily on that side; and moreover the rule might work great hardship on the accused if his most important, and it might be his only witness, had died, and no evidence could be received at the subsequent trial of what his testimony had been on the previous one. This is especially likely to happen in these days of frequent appeals and new trials.

All the requisites for valid testimony are present; the accused is present and can cross-examine and deny; the witnesses in both trials are under oath and liable for perjury if they swear falsely.

It cannot be objected that it is too dangerous a practice to allow *viva voce* testimony as to what was sworn to by a witness on a previous trial, for the same thing is done continually in cases of perjury, and men convicted upon it; and moreover in such cases the exact words of what the accused swore are not required to be given, but merely the substance of his testimony.

Under the modern system of law reporting and official stenographers, it is now very easy to produce with the utmost exactness the testimony given on a trial by a witness, and the same danger would not be incident to the admission of such testimony as would be under the old system, and therefore there is not the same objection to it now as formerly.

According to the rule, *stare decisis*, it is now too late, perhaps, to question a rule of evidence that has been so long recognized in Virginia; but we submit that the rule was established without sufficient authority in the first place, is against the large preponderance of authority in this country now, and is not justified by reason or expediency.

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